



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE POWER AND DUTY OF THE FEDERAL GOVERNMENT TO PROTECT ITS AGENTS.

BY EDGAR ALDRICH, LL.D., UNITED STATES DISTRICT JUDGE FOR
NEW HAMPSHIRE.

CZOLGOSZ killed Mr. McKinley, not because he was William McKinley, but because he was President of the United States; not because of his personality, but because he represented the idea of law and government. The violence was directed against the official, rather than against the private individual; against the office, not the man. All the surrounding circumstances, as well as the admission of the assassin, show that personal malice, ordinarily present in crime, was altogether absent, and that malice against the idea of government was present. The motive for the fatal shot was not to destroy McKinley, except as a step in the direction of destroying the idea of government and law, which, for the time being, he represented as the head of the executive branch of the government. Mr. McKinley was the representative of the people in respect to their idea of government; and the blow being directed against the idea, it follows that the real crime was against the people and their government, rather than against McKinley as an individual.

The motive and the malice of such malevolents being thus impersonal (*malitia impersonalis*), and against the idea of the restraint of government through law, the resulting impulse prompts the hand to be raised in deadly violence against any one who happens, through the suffrages of the electors, to be charged with the duty of administering the government. That is a most venomous and deadly motive. It at once involves a menace and a crime against the existence of the government. Those who, without personal malice, would raise the hand to kill a brother man because he is conscientiously administering a civilized govern-

ment, are few in number. Just how many there are is not known, but the time has come when the extent of this deadly impersonal malice should be known. If there are only a few who hold and carry it, let us know it, and make reasonable protection against them; if there are many, let that be known, that we may either yield to the deadly malice or deal with it sternly and resolutely.

Under our system, the government means nothing above or beyond the intelligent expression of the will of the people; and when the people ordain that a form of government shall exist for the protection of communities in accordance with the requirements of civilization, they assume the responsibility of upholding the institution which they have created. The government cannot administer itself except through its chosen agents, representatives or servants. These it must have in order to become operative for the purposes for which it is created. It lies with the people to create a government; they may, therefore, maintain it. The people cannot maintain a government without agents; they may, therefore, protect such agency through such legislation as the necessities arising out of a threatening evil or pending danger demand.

To justify such legislation it is not necessary to invoke the "general welfare" clause of the Constitution, which declares that Congress shall have power to "provide for the common defence and general welfare of the United States," because all governments necessarily possess the inherent power of self-defence, and such general inherent power of self-defence will justify all necessary and well ordered legislation for the protection of all necessary agents and representatives. While, as a general rule, civilization and communities receive protection from the State governments, the federal government does exist as an entity and for certain limited purposes expressed and contemplated by the Constitution; and, so existing, it may pass all laws necessary for its safety. It may declare violence upon its agents, servants and representatives to be a crime against its own existence. It may declare threatened violence to be a crime, because that involves conduct calculated to disturb the good order and well-being of its administration. In short, it may, without regard to the enumerated and defined offences of the old common law, throttle and control any evil directed against its existence or well-being. This is a necessary and inherent power. The doctrine of the right of

self-preservation is as ancient as law itself, and is based upon a natural right. The right of the government to defend, protect and preserve itself against whatever evil may threaten is a natural, inherent, fundamental, self-evident, incontrovertible, and paramount right.

The killing of William McKinley as a private citizen in Ohio, or as a transient inhabitant of any State, would be an offence exclusively against the laws of that State; but the killing of the incumbent of the Presidential office, because of the office and what it represents, may well be declared a crime against the existence of the federal government, because the government cannot exist without administration, and it cannot be administered in its present form without a President.

Thus far, Congress has undertaken to deal with murder only when committed by persons in the army in time of war, and when committed upon the high seas, or within the forts, arsenals, dockyards and districts under the exclusive jurisdiction of the United States, or upon the arms of the sea and the rivers and waters within the admiralty and maritime jurisdiction thereof, and out of the jurisdiction of any particular State; and this is for the reason that, as a general proposition, the offence of murder, under our system, is left to be regulated and dealt with by the State governments.

It is, quite likely, true that assumption by the federal government of general jurisdiction over actual and threatened murder of private citizens in the various States would be unwarrantable; still, while, as a general proposition, it rests with the States to deal with individual homicide, pure and simple, Congress may well declare it to be an offence against the general government to use the mails for the purpose of producing homicide, like sending poison through the mails, or the germs of infectious disease, for the purpose of spreading death and destruction; and this is upon the ground that the general government has inherent and unquestioned power to protect itself in the service which it undertakes to perform in the interests of civilization and for the benefit of the people. It is upon this ground that Congress has made it a crime to use the mails for the distribution of obscene literature and prints, and for gambling and other immoral purposes. Doubtless, if a mail carrier should be unlawfully killed within a State, the individual crime would be cognizable there; but the

general government might well declare it to be an offence to kill, or plot to kill, any or all of the mail carriers in the country, not because they are individuals, but because they are officials or servants charged with the operations of the general government in respect to a duty which the general government is expected, under the Constitution and the laws, to perform for the people. Larceny, as a general proposition, is an offence cognizable in the State courts; yet the general government may and does deal with it in respect to property used in its service and operations.

From a very early date, the federal government has assumed and exercised jurisdiction over crimes against the existence and operations of the government. Under title LXX. of the Revised Statutes (2d ed., 1878), page 1048, chapter five, under the head of "Crimes against the Operations of the Government," there are enumerated various offences against the service which the government performs, like counterfeiting coins and securities, bribery of officials, robbery of the mails, breaking and entering postoffices, and sending letters through the mails with intent to defraud. Some of these statutes were passed as early as 1823. A preceding chapter enumerates crimes against the existence of the government, in which such subjects were dealt with as early as 1790.

The old English statutes provide against assaults committed upon particular persons and in special places, like assaults upon legislators, clerical persons, and in places of worship, in places for state affairs, and in courts of justice. Mr. Bishop, in his work on criminal law, says the principles of these statutes and of the judicial decisions thereunder have come to us through the adoption of the common law. In recognition of this familiar principle, Congress, as early as 1790, enacted a law, which is now section 4062 of the Revised Statutes, making assaults upon public ministers, in violation of the law of nations, an offence against the government. Section 3869, passed in 1872, makes an assault upon a letter carrier in uniform a federal offence, and section 5398, found under the title of "Crimes against Justice," in the Revised Statutes, makes it a crime to assault an officer of the United States in serving a process. This statute was enacted in 1790. Therefore, if Congress may make it a crime to assault a foreign minister, a mail carrier, or a United States Marshal or his deputy, who are in the exercise of a public function, it may unquestionably make it a crime to kill such agents.

In other words, it follows, without the enunciation of any new principle or doctrine, that if the government has power to protect its existence and its operations by declaring it to be a crime to bribe or to interfere with its servants and its operations, it may declare it to be a crime to destroy the servants necessary to inaugurate and carry forward the operations and service contemplated by the Constitution and the laws, and for which the government was created. So it may well be declared that the killing of a President for the purpose of destroying the effect, or disturbing or stopping the operations, of the government shall be a crime. It may also well be declared that plotting or conspiring to kill and destroy the agents and representatives necessary to the exercise of the functions of government shall be a crime. And, if it shall subsequently be found that at Paterson, or elsewhere within the federal jurisdiction, there are men who plot to destroy the government or its necessary servants or representatives, such offenders, upon conviction, may well be dealt with as criminals against the government and its operations. If it shall be found that there is, there or elsewhere, a school in which is inculcated the assassination of Presidents and others charged with the execution of the laws, not upon personal motives but because they are officials; if it shall be found that, for the same purpose, they teach how to shoot and where to shoot to make the shot fatal, or how to make and use powerful explosives for such destruction; or if it shall be found that they appoint persons from their number to kill, and designate the officials to be killed, and appoint alternates to act in case the persons so appointed shall fail, it would be justifiable, upon trial and conviction, to deal with such a nest and such offenders in such a way as would scatter them to the four winds; and, if deemed necessary for the protection of the people and the government, Congress may declare that, upon proper proceedings and conviction, those who plot to kill its servants and representatives shall themselves suffer death, nor need the law wait until the raised and threatening hand is red with the blood of the victim. In doing this, Congress only needs to invoke the ancient, fundamental, and familiar doctrine as to the right of self-defence.

It is not necessary to deal with the subject of anarchy historically, philosophically or theoretically. The situation presents a condition, not a theory. It is not necessary, in deciding whether

unlawful and premeditated killing is culpable and should be visited with commensurate punishment, or whether threatened unlawful and deadly violence should be restrained, to go back centuries to examine as to the cause, as was done by Mr. Charles Johnson in his article on the Anarchists and the President, published in the October number of this REVIEW. Violence and threatened violence against the operations of the federal government should be dealt with practically, as other crimes are dealt with. In the meantime, the duty is upon us to discover and remove the cause as speedily as possible. Fight the danger as you would fight a raging fire, subdue and control it, and then look for and regulate the cause.

All vice and crime are supposed to result either directly or remotely from unwholesome conditions, in which environment is a prominent element. Notwithstanding this, however, it remains a duty and a necessity that communities shall be protected against murder, rape, arson and other vices and crimes. It is not even necessary to stop to inquire what criminal impulse or what phase of degenerate and venomous malice it is that raises the hand in violence against a government founded upon principles of equal rights to all, and without personal malice carries the deadly dagger to a heart which beats in sympathy with the oppressed and unfortunate everywhere.

For the purposes of resolute and decisive action, it is enough to know that the impulse and the evil exist and that the danger threatens. It is not necessary to precipitate philosophical and theoretical discussion and argument by declaring against anarchy or socialism or freedom of speech, or to raise discussion as to an amendment of the provision of the Federal Constitution which declares of what treason shall consist. It is immaterial whether those who plot violence against the government are nihilists, anarchists, socialists or pretended saints. Violence against the government, or its necessary, lawful and constitutional representatives, may be declared a crime wherever found and by whomsoever inculcated or inspired, whether by anarchists or those who are not anarchists, whether by laymen or judges or heretics. Let the blow be directed against the violence and those who inspired it, whoever they are. Do not hazard the imperative call for immediate remedial legislation, or dissipate the chance of an effective remedy, by declaring against a class, or by declaring

who are within a certain class, but provide the required remedy by directing it against those who teach and practice deadly violence. Do not offend the beliefs of any reasonable man in respect to the right of freedom of speech and freedom of the press, guaranteed by the Constitution. Probably no one will claim, however, that the constitutional guaranty of freedom of speech and of the press goes to the extent of protecting persons in the open advocacy of the unlawful killing by violence of the necessary and constitutional agents and representatives of the government. It would be a strange argument which should hold that the constitutional provision as to freedom of speech was intended to justify the advocacy of violent and premeditated destruction of the constitutional President and necessary head of the government as fast as one after another shall be inducted into office. No one will claim that.

The general government may protect itself against the danger of threatened violence. It may through its Congress declare that persons who associate themselves together or assemble for the purpose of discussing or considering means for destroying persons charged with the execution of the federal laws shall be deemed guilty of conspiracy, and it may through its Congress provide such punishment as the dangers and exigencies of the situation demand.

As already said, the blow which killed Mr. McKinley was directed against the operations of the government; and while the premeditated killing of a President for such a purpose is murder, and an offence against the laws of the various States, the real and higher offence, the moral offence, is against the federal government, for the reason that the prime, indeed, the only, motive is to injure the government and the operation of its laws rather than the individual who happens to be the incumbent of the Presidential office.

This being so, it is within the unquestionable power of Congress to declare it to be a crime against the existence, purpose and operations of the federal government.

Thus far as to the power of the government, under the Constitution, to protect its existence and administration. Now what as to the duty?

The duty is plain. The question of duty is settled by a question which answers itself: Shall the government exist, and shall

it protect itself and its necessary Executive against unprovoked and deadly violence?

It should not only make actual violence a crime, but it should make threatened violence a crime. It should declare it to be a crime against the government to plot and teach how to destroy its instruments and agents of law and order. It should declare conduct of a character calculated to inspire unlawful violence a crime. It should not deal with any phase of the question in a spirit of vengeance, but it should deal with all of its phases in a spirit of stern resolution and courage, and with an unalterable determination that all things shall be done which are necessary to preserve and protect the government and its operations under the Constitution and the laws, and it should do all this to the end that all of its agents and every citizen and resident under its jurisdiction shall be secure in life and peace and protected in all their just rights.

The statement of a grievance fairly enough calls for some practical suggestion as to a remedy, and I therefore venture to present for discussion the following tentative draft of a bill relative to the conditions involved in the situation which confronts the American people:

Section 1. Any person or persons who shall intentionally kill, or who, with intent to kill, shall assault the President of the United States, the Vice-President thereof, or any person in the line of Presidential succession as fixed by the Constitution or laws of the United States, shall, upon conviction thereof, be punished by death.

Sec. 2. Persons who, with intent so to do, shall by word or print incite others to kill, and who by such means shall have caused others to kill the President of the United States, the Vice-President thereof, or any person in the line of Presidential succession as fixed by the Constitution or laws of the United States, shall, upon conviction thereof, be punished by death.

Sec. 3. Any person or persons who shall intentionally kill any ambassador or minister from a foreign state or country resident in the United States, shall, upon conviction thereof, be punished by death.

Sec. 4. Persons who, with intent so to do, shall by word or print incite others to kill, and who by such means shall have caused others to kill, any ambassador or minister from a foreign state or country resident in the United States, shall upon conviction thereof be punished by death.

Sec. 5. Any person who shall threaten to kill the President of the United States, the Vice-President, or any person in the line of Presidential succession, shall be deemed guilty of a menace to the good order and well-being of the federal government, and of conduct calculated to incite violence upon persons charged with the execution of

its laws, and, upon conviction thereof, shall be imprisoned not exceeding thirty years.

Sec. 6. Any person who shall assault or threaten to kill an ambassador or minister of a foreign state or country accredited to the United States and resident therein shall be deemed guilty of a menace to the federal government and of conduct calculated to incite violence upon persons whom, by the law of nations, it is bound to protect, and, upon conviction thereof, shall be imprisoned not exceeding thirty years.

Sec. 7. Any person who shall expressly, openly and deliberately approve of the intentional, violent and unlawful killing of a President of the United States, a Vice-President, or any person in the line of Presidential succession as fixed by the Constitution or the laws of the United States, shall be deemed guilty of conduct calculated to incite unlawful violence against the government of the United States and upon persons charged with the execution of its laws, and, upon conviction thereof, shall be imprisoned not exceeding twenty years.

Sec. 8. Any person who shall expressly, openly and deliberately approve of the intentional, violent and unlawful killing of an ambassador or minister representing a foreign state or country and resident in the United States, shall be deemed guilty of conduct calculated to incite unlawful violence upon persons whom, by the law of nations, the federal government is bound to protect, and, upon conviction thereof, shall be imprisoned not exceeding twenty years.

Sec. 9. Persons associating themselves together or assembling within any State or Territory for the purpose of discussing and considering means for killing any person charged with the duty of executing the federal laws, shall be deemed guilty of conspiracy against the good order and well-being of the federal government and the due execution of its laws, and, upon conviction thereof, shall be punished by death.

Sec. 10. Persons associating themselves together or assembling within any State or Territory for the purpose of discussing and considering means for killing any chief or head of a foreign state or country, or any ambassador or minister of a foreign state or country resident in the United States, shall be deemed guilty of conspiracy against the good order and well-being of the federal government, and, upon conviction thereof, shall be punished by death.

Sec. 11. Any person who shall openly and deliberately advocate the violent overthrow of all government whatsoever, and who shall openly and deliberately declare himself against the enforcement of any and all law, shall be deemed guilty of a menace to the federal laws and to the good order and well-being of civilization, which the federal government is in part bound to uphold and maintain, and of an offence against the government of the United States and, upon conviction, shall be imprisoned for ten years or for a less period as justice in the particular case may require.

This draft enunciates no new doctrine. It invokes no new principle. It only carries the ancient, well-known and wholesome principles of the common law to the needed protection of the general government. Let it at once be declared by Congress, and

let it at once be understood by all who are here, and by all who may come, that killing, conspiring and threatening to kill the necessary agents of the federal government because they are such are crimes against a government which must and shall be upheld. It is high time that this should be declared and understood. It is worse than idle, it breeds contempt for the government, to surround the President with detectives to hunt through a mass of humanity to find those who carry revolvers, daggers and explosives for deadly use, when no adequate federal remedy is provided for dealing with such offenders when found.

It has always been unlawful to kill, and section one of the suggestive draft declares against that. It has always been unlawful to assault with intent to kill, and section one declares against that also, with a severer penalty than has ordinarily attached to such offence in modern times; and the severer penalty is justified by the enormity of the offence, that of attempting without provocation to destroy an innocent man because he happens to be the representative of the people's government. A malice or a general malevolence which provokes an assault under such circumstances should receive a rebuke commensurate with its enormity.

Section two declares against those who incite others to assassinate. This has always been an offence, and all this section proposes is that the government shall assert its right to invoke and administer, for its necessary protection, the law which other jurisdictions have enforced from time immemorial. Section three proposes to include within its provisions ambassadors and ministers from foreign countries. This is upon the ground that Congress may, under the general welfare clause, pass any law necessary for the protection and well-being of the general government. Its welfare and well-being imperatively demand that ambassadors and ministers from foreign countries with whom it has international relations, and who are residents at its capital, shall be protected from violence. The obligation of protecting such foreign agents has existed, under the principles of international comity and the law of nations, at least since the days of Vattel and Phillimore.

Section five deals with threats to kill. While threats alone have not been generally accepted as sufficient to constitute an assault, yet by the old common law threats to kill were treated as

a breach of the peace; and it is proposed to carry this principle to the protection of the government on the ground that threats to kill its agents are deemed to be a menace to the good order and well-being of the federal government, and involve conduct calculated to incite violence upon persons charged with the execution of its laws.

Sections seven and eight propose to deal with those who approve of unlawful killing, and this is upon the ground that the conduct involved in such expressions of approval is calculated to incite unlawful and deadly violence. It is one thing to express satisfaction or approval of the natural death of a person or an official; it is quite another and a different thing to express approval of their unlawful and violent destruction.

Section nine deals with those who associate themselves together for the purpose of plotting the violent destruction of persons charged with the duty of executing the federal laws. It has for centuries been an offence at the common law to conspire for the purpose of taking human life. A plot to kill or destroy persons charged with the duty of executing the federal laws may well be made an offence against the government, and this may be done without enunciating any new principle. The law of conspiracy does not require or wait for an overt act in furtherance of the conspiracy. The gist of the crime is in the plot, and the law at once operates upon all who conspire for an unlawful purpose. Section ten declares against a plot to kill or destroy any chief or head of a foreign state or country, or any ambassador or minister from a foreign state or country resident in the United States. This may well be done under the general welfare clause of the Constitution, for it is plain enough that the welfare and the well-being of the United States Government require that plots shall not be hatched and perfected upon American soil for the destruction and assassination of European rulers with whom it holds friendly international relations.

Section eleven declares against those who openly and deliberately advocate the violent overthrow of all government, and who declare themselves against the enforcement of any and all law. At the common law, such persons were treated as outlaws. This again presents a situation to be dealt with practically. How idle it is to hope that, as humanity now exists, people could rest in peace and security without law and without government. It is one

thing to advocate a different kind of government, or a less oppressive government than that which we have; but it is another thing, and a crime against the well-being of civilization, to advocate the overthrow of all government, and to declare against the enforcement of all law. Why should not a man whose voice and whose hand are raised in violence against all law, and against all men, as a class, who are charged with the duty of upholding and executing the laws in the interest of peace, good order and the well-being of states and communities, be deemed an offender against the Government, to be dealt with according to the modern idea of civilized punishment, and subjected to such restraint as Congress shall deem proper in such a case, and such as shall be deemed commensurate with the offence? Those who declare against all government and all law are inimical to civilization and good order, and their conduct portends evil to our institutions. Such persons are unfriendly to and against our government, and such attitude should be declared by Congress to be an offence. Why, upon trial and conviction, should not the blessings and the protection of government be wholly withdrawn, and why, upon conviction should not such offenders be treated as foes to civilization and humanity? If Congress deemed it expedient it might unquestionably go beyond what is proposed in section eleven by way of penalty and enact a law authorizing a judgment of outlawry against a person convicted of such an offence against the government, and such a law would not be a bill of attainder within the meaning of the Constitution. Outlawry process against offending and convicted persons was well known in the English law when our government was founded, was not inhibited by the federal Constitution, and has been used and practiced since the Constitution was adopted in several of the states—as, for instance, Virginia, Alabama and Pennsylvania.

Though under the shadow of a crime so shocking that it appals the civilized world, and though confronted by an unjust and unreasoning fury, the cry of the American people is not for vengeance, but for clear and resolute repressive measures against violence and threatened violence; and the honor and integrity of the nation demand that such measures shall be enacted into law.

EDGAR ALDRICH.